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No. 03-603

IN THE

Supreme Court of the United States

WORLDCOM, INC.,
Petitioner,

v.

WISCONSIN BELL, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

Respondent's brief fails to grapple with the central point presented in these Petitions. The Seventh Circuit held that the Telecommunications Act of 1996 prevents States from exercising their authority to require incumbent local telephone carriers such as Respondent to make services available to competing carriers via tariffs – an authority state commissions have exercised both before and since the passage of the Act. The decision thus imposes a severe restriction on state sovereignty. Moreover, it does so in the absence of any provision of the 1996 Act preempting such pro-competitive state tariffs expressly, and in the face of numerous provisions of the Act that explicitly *preserve* state authority and make clear Congress' intention that States play a critical role in implementing the Act's interconnection provisions. As MCI's Petition, the Petition filed by the Wisconsin Commission, and the amicus brief on behalf of the National Association of Regulatory Utility Commissioners ("NARUC") all demonstrate, the impact of the Seventh Circuit's encroachment on state sovereignty is not just theoretical. The Seventh Circuit has eliminated an important practical tool that States have used for more than a decade in efforts to open local telephone markets to competition.

Largely ignoring these critical points, Respondent devotes the bulk of its brief to an excruciatingly detailed parsing of numerous decisions of the courts of appeals and the FCC in an effort to show that there is no conflict among the Circuits that merits this Court's review. That effort is to no avail, as there is little doubt that a direct conflict exists: the tariff upheld by the Sixth Circuit in *Michigan Bell Telephone Co. v. MCImetro Access Transmission Services, Inc.*, 323 F.3d 348 (6th Cir. 2003), would plainly be invalid under the Seventh Circuit's decision below. In all events,

Respondent's laborious effort to rationalize the numerous decisions in this area merely confirms the widespread confusion among the courts of appeals and regulatory authorities regarding the extent to which the 1996 Act impliedly preempts States from using tariffs in order to further local competition. In view of the issue's legal and practical significance, that widespread confusion is sufficient to warrant this Court's review.

1. MCI, the Wisconsin Commission, and NARUC all urge this Court to grant review because the Seventh Circuit's decision deprives state regulators of an important tool for overcoming incumbents' efforts to delay the onset of competition in any way possible. In the absence of tariffs, incumbents can force new entrants to resort to the nine-month process of negotiation and arbitration whenever an interconnection request differs slightly from a pre-existing contract, or whenever an unanticipated legal or practical problem arises requiring amendment to an existing interconnection agreement. That delay severely undermines the competitive prospects of new entrants.

Respondent's principal response is to suggest that the Act itself adequately addresses any concerns about undue delay. *See* Opp. Br. at 23-25. But in the real world in which Petitioners operate, no interconnection agreement could possibly set forth the incumbent's obligations with sufficient clarity and detail to foreclose every conceivable ground for delay. Nor could an agreement adequately anticipate every change in the marketplace or legal landscape. State commissions have thus appropriately established tariffs to fill in gaps and ensure that the rules of the game can be modified rapidly so that competition can take hold. State tariffs have been used, for example, to address an

incumbent's refusal to accept orders from new entrants by facsimile, *see Michigan Bell*, 323 F.3d at 353-54; to create a "safety net" by specifying a minimum level of discount for resold services, *see In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460 ¶ 132 (1997) ("*Texas Preemption Order*"); and (as here) to override an incumbent's imposition of terms and conditions that the state commission determined were be "unreasonable" and constituted "unacceptable overreaching." Pet. App. 57a-58a; *see also* NARUC Br. at 4 nn.6-7 (citing tariffs from Indiana and Oregon); *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) (addressing Michigan tariffs), *cert. denied*, 123 S. Ct. 1649 (2003). That so many state commissions have felt the need to resort to tariffs to prevent delay refutes Respondent's assertions.

Respondent also seeks to divert attention from the severe practical consequences of the decision below by asserting that interconnection agreements have allowed competing carriers to "steadily increase their market share." Opp. Br. at 27. But today, nearly eight years after the passage of the 1996 Act, incumbents maintain market shares that are nearly 90% nationwide. Indeed, it is precisely the *lack* of success achieved by new entrants in seeking to overcome the intransigence of incumbents such as Respondent that has spurred Wisconsin and other States to use tariffs.

Respondent next suggests that, whatever the practical impediments to competition, state law tariffs are preempted because federal law "trumps state action that 'interferes with the *methods* by which the federal statute was designed to reach its goal,'" Opp. Br. at 15 (quoting *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992)) (emphasis and alteration in Respondent's brief), and because States are bound "not only by the ultimate purposes

Congress has selected, but by the means it has deemed appropriate." Opp. Br. at 15. Whatever the validity of those principles as a general matter, they have no application here. Congress disclaimed *expressly* any intention to limit the ability of States to supplement the interconnection provisions of the 1996 Act with pro-competitive state law requirements. Indeed, § 251(d)(3) expressly preserves "any regulation, order, or policy of a State commission that . . . *establishes access and interconnection obligations* of local exchange carriers," 47 U.S.C. § 251(d)(3)(A) (emphasis added), a category that indisputably includes tariffs such as the one Wisconsin imposed here.

Respondent tries half-heartedly to reconcile the express preservation of state tariffs in § 251(d)(3) with its implied preemption argument. Respondent observes, for example, that § 251(d)(3) preserves only those state tariffs that "do not substantially prevent implementation of this section *and the purposes of this part*," Opp. Br. at 17 (emphasis in original), and argues that "[o]ne of the primary 'purposes of this part'" is "the establishment of a comprehensive federal mechanism for implementing interconnection and access rights and obligations through interconnection agreements." *Id.*

But that argument is doubly mistaken. First, it confuses the "purposes of this part" – the opening of local markets to competition – with the method Congress chose to accomplish those purposes, namely the interconnection agreement process. The interconnection process is a means to an end, not an end in itself.

Second, under the Seventh Circuit's decision and Respondent's argument, *any* state requirement that "establishes access and interconnection obligations of local exchange carriers" is inconsistent with the negotiation and

arbitration procedures established by the Act. *Cf.* Pet. App. 16a (Cudahy, J., dissenting) ("[T]he only issue is whether there is any set of facts under which the [Commission] can require tariffing."). The effect of Respondent's argument (and the decision below) is thus to read § 251(d)(3) out of the Act.

The dramatic incursion on state authority accomplished by the Seventh Circuit and defended here by Respondent is particularly inappropriate given Congress's intent in the 1996 Act to build on, not displace, state efforts to open local markets to competition. *See, e.g.*, S. Rep. No. 104-23 at 5 (1995) (noting with approval state efforts to "open the local networks of telephone companies"). The Act is rife with expressions of congressional intent to *preserve* pro-competitive state laws. *See, e.g.*, 47 U.S.C. § 251(d)(3); *id.* § 261(c); *id.* § 252(e)(3); Act § 601(c), 110 Stat. 56, 143 (1996) (uncodified note to 47 U.S.C. § 152). Moreover, the Act's express preemption provisions eliminate only "barriers to entry." *See* 47 U.S.C. § 253(a) (granting authority to preempt state requirements that "prohibit or have the effect of prohibiting" competition).[1] To read the Act, as Respondent does, as seeking to undo and prohibit state

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[1] Nothing in *United States v. Locke*, 529 U.S. 89 (2000), or *Geier v. American Honda Motor Co.*, 529 U.S. 873 (2000), is to the contrary. Opp. Br. at 16-17. In *Locke*, the Court held that a savings clause in one part of a statute should not be construed to "save" state laws relating to other parts of the statute. 529 U.S. at 105. Here, of course, the savings clauses are in the very sections of the statute (sections 251 and 252) that create the interconnection obligations. In *Geier*, the Court relied heavily on the views of the implementing agency to conclude that the state law at issue was preempted. 529 U.S. at 874-75. Here, in contrast, the implementing agency (the FCC) has refused to preempt state tariffs like the one at issue here. *See supra* pp. 8-9.

efforts to open local markets to competition is to step through the looking glass.

2. Nothing in Respondent's brief can mask the direct conflict and widespread confusion among the courts of appeals and regulatory bodies regarding the authority of state commissions to impose tariffs to speed the process of opening local telephone markets to competition.

The Seventh Circuit held that a state tariff "*has* to interfere with the procedures established by the federal act," Pet. App. at 6a (emphasis in original), because it "places a thumb on the negotiating scales," *id.*; "complicates the contractual route" envisioned by the Act, *id.*; "shortcircuits negotiations, making hash" of the Act's timing provisions, *id.* at 7a; and deprives incumbents of "a degree of protection" that the Act otherwise provides, *id.* As the majority opinion and the dissent agreed, the panel decision adjudicating Respondent's facial challenge unambiguously eliminates Wisconsin's authority to tariff *any* interconnection obligations. *See* Pet. App. 2a ("The question presented by this appeal is whether a state may create an alternative method by which a competitor may obtain interconnection rights."); *id.* at 16a ("[T]he only issue is whether there is any set of facts under which the [Wisconsin Commission] can require tariffing."). Under the Seventh Circuit's decision, therefore, neither the tariff upheld by the Sixth Circuit in *Michigan Bell* – which entitled incumbents to fax interconnection orders – nor the tariff upheld by the FCC in the *Texas Preemption Order* – which established a minimum discount to be applied to services ordered by new entrants for resale – could survive. The conflict is thus square and undeniable.

Respondent seeks to cloud this conflict by citing to the Sixth Circuit's decision in *Verizon North, Inc. v Strand*. *See* Opp. Br. at 7-8. But the Seventh Circuit has foreclosed Wisconsin's authority to add interconnection obligations under *any* circumstances. The critical point is thus that the Sixth Circuit allows tariffs in *some* circumstances – as *Michigan Bell* makes clear that it does – including circumstances such as the ones presented here. That the Sixth Circuit forecloses tariffs in other circumstances (as in *Verizon North*) is beside the point.[2]

Moreover, by its own terms, *Verizon North*'s preemption holding is limited to state-law tariffing obligations that allow competing carriers to bypass the "entire interconnection process." *Verizon North*, 309 F.3d at 943. The Sixth Circuit made clear in *Michigan Bell* that *Verizon North* is inapplicable in situations in which the competing carrier and the incumbent have already entered into an interconnection agreement, and when the agreement itself does not preclude the use of state-law tariffs. 323 F.3d at 360. Here, the Wisconsin Commission specifically (and correctly) found that the tariffs at issue in this case did "not

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[2] Nor is it relevant that *Michigan Bell* involved only the "manner of submitting" orders for certain services. Opp. Br. at 10. The method by which a competing carrier orders interconnection services from an incumbent is a "substantive interconnection obligation" that directly establishes the terms and conditions of the competing carrier's interconnection with the incumbent carrier. Indeed, before the Sixth Circuit, Respondent's subsidiary contended that the tariff at issue in *Michigan Bell* imposed "an interconnection obligation that is inconsistent with the terms of a binding section 252 agreement." Brief of Appellee Michigan Bell Tel. Co. at 23, filed in *Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs.*, 323 F.3d 348 (6th Cir. 2003). *Michigan Bell* is simply irreconcilable with the Seventh Circuit's decision in this case.

create a complete regime" of interconnection that would allow carriers to "bypass" the § 252 process and provide services without ever entering into an interconnection agreement. Pet. App. 57a. Indeed, MCI went through the Act's interconnection agreement process and is a party to an existing interconnection agreement with Respondent, *see* Pet. at 29, and nothing in that agreement precludes reliance on state tariffs. *Verizon North* is thus a red herring.

Nor is Respondent correct that the petition for a writ of certiorari in *Verizon North* raised "the same question and the same inter-circuit conflict argument asserted again by petitioners." Opp. Br. at 6-7, 11. The Sixth Circuit issued its decision in *Michigan Bell*, which clarified the scope of its decision in *Verizon North*, *before* the petition for certiorari was denied in *Verizon North*. Thus, when this Court resolved the petition in *Verizon North*, no Circuit had yet held that States were absolutely foreclosed from using tariffs. It was not until the Seventh Circuit issued its decision in this case that the split among the Circuits was created.

Respondent similarly seeks to muddy the waters with respect to the FCC's *Texas Preemption Order*, 13 F.C.C.R. 3460. The Texas provision at issue allowed new entrants to purchase an incumbent's local exchange service at a five percent discount from the retail rate specified in the incumbent's local tariff. *Texas Preemption Order* ¶ 15. The Texas Commission thus permitted new entrants to order directly from a tariff, rather than going through negotiation and arbitration process. The FCC upheld the Texas tariff, *id.* ¶ 139, while it is plain that the Seventh Circuit would have invalidated it.

Respondent seeks to distinguish the *Texas Preemption Order* on the ground that Respondent here is "precluded

from invoking [Sections 251 and 252] to the extent a competitor opts for the [state]-imposed tariff." Opp. Br. at 13 n.3. But the same was true in Texas – when a new entrant purchased services off the state tariff, the incumbent could not "invoke" the Act's arbitration and negotiation provisions.

Nor does the FCC's decision in *In re Petition of WorldCom, Inc.*, 17 F.C.C.R. 27039 (2002) ("*Virginia Arbitration Order*") change the analysis. *See* Opp. Br. at 13. In that instance, it was the *incumbent* seeking the right to file rates in a tariff that would apply immediately to new entrants. MCI (then-WorldCom) argued to the FCC that such a procedure was contrary to the Act because "the tariffed rates filed with the [state] commission might exceed the cost-based rates that the Act requires." *Virginia Arbitration Order* ¶ 592. The FCC refused to allow the tariff-filing procedure. The fact that the FCC refused to allow a tariff that was anti-competitive – *i.e.*, a tariff that allowed an incumbent to set unilaterally the terms of competition – says nothing about the FCC's view of tariffs, like the one at issue here, that are indisputably *pro-competitive*. As for those tariffs, the analysis in the *Texas Preemption Order* is controlling.[3]

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[3] Respondent's attempt to square the decision with *U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241 (10th Cir. 2002), fares no better. Respondent's assertion that it was "uncontroverted" that Colorado law required the incumbent to file tariffs, Opp. Br. at 11 is no distinction – it is equally "uncontroverted" in this case that Wisconsin law requires Respondent to tariff the services at issue. It is equally plain that the Tenth Circuit addressed the critical issue. After analyzing one specific provision of the Act, the court stated that it was also addressing "whether the tariff opt-in provision violates any other portions of [the Act]." 275 F.3d at 1249. The district court in that case, just like the Seventh Circuit here, had held that allowing a competing carrier "to use a tariff to supplement or supplant any term,

In the end, Respondent's detailed discussion about the divergent approaches taken by courts (both within and across Circuits) and regulatory agencies merely confirms the need for this Court's review. State regulatory authorities have asserted their continuing authority to impose tariffs where appropriate to facilitate competition, *see, e.g.*, NARUC Br. at 4 n.7, and the federal courts and the FCC have upheld many of these tariffs, including tariffs that are materially indistinguishable from the tariff at issue here. The Seventh Circuit, in contrast, has foreclosed Wisconsin (and the other States in the Seventh Circuit) from supplementing interconnection agreements with state tariffs under any circumstances. This Court should step in to provide much-needed clarity regarding the scope of state authority to further the Act's pro-competitive goals by using state tariffs.

CONCLUSION

The petition for a writ of certiorari should be granted.

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condition, or price that is covered by the agreement . . . would eviscerate the provisions of [the Act]." *Id.* at 1249-50 (quotation omitted; alteration in original). The Tenth Circuit squarely rejected that reasoning, holding that the tariffing provision "does not diminish the negotiation process, but instead ensures that a [competing carrier] will be able to obtain the most favorable prices and terms available, thereby allowing it to remain competitive in the local marketplace." *Id.* at 1250.

Respectfully submitted,

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